

89-5880

Supreme Court, USA
FILED

AUG 16 1989

JOSEPH F. SPANIOLO, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WALTON B. NOBLE,
Petitioner

VERSUS

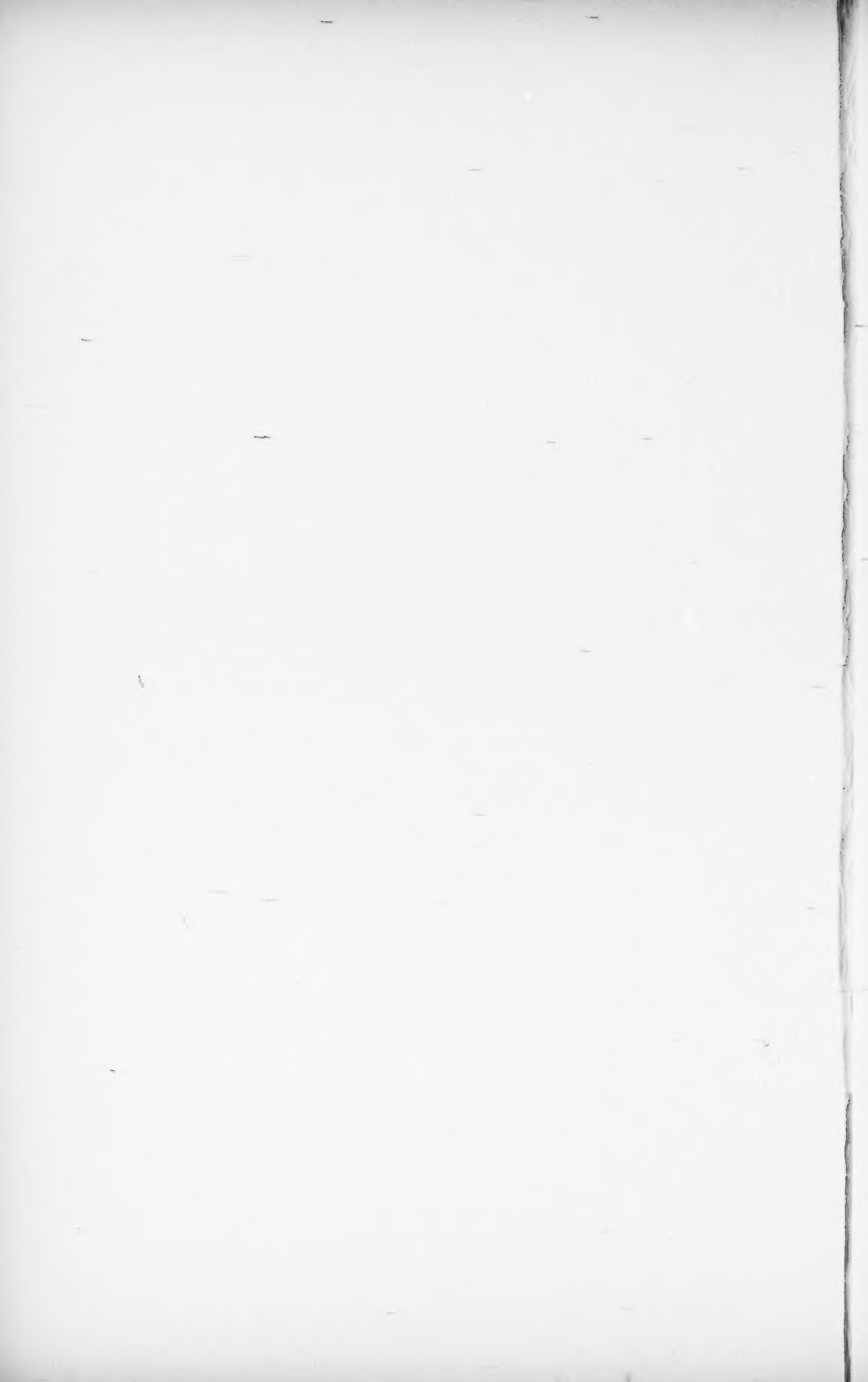
JAMES McMILLAN, ET UX

On Writ of Certiorari
to the Court of Appeal of Louisiana, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Nevada state trial court (Eighth District Court for the State of Nevada) had jurisdiction over this petitioner, W. B. Noble, to render its default judgment against him.
2. Whether the Louisiana court of first instance (Civil District Court for the Parish of Orleans, State of Louisiana) properly found jurisdiction in the Nevada Court in maintaining its judgment under Louisiana's Enforcement of Foreign Judgments Act and statutes; whether the Louisiana appellate court properly affirmed, and the Supreme Court of Louisiana properly denied Noble's application for review of the lower courts' decisions.
3. Whether the Court of Appeal of Louisiana, Fourth Circuit final judg-

ment on the merits should be reversed on the constitutional grounds represented by Noble below, i.e., deprivation of his Fourteenth Amendment rights to due process of law and equal protection of the laws.

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REFERENCE TO REPORTS OF OPINIONS BELOW

No official or unofficial reports of the courts' opinions below were found to be published. The entire opinion of the Court of Appeal of the State of Louisiana, Fourth Circuit is included in the appendix hereto.

STATEMENT OF GROUNDS ON WHICHJURISDICTION IS INVOKED

Petitioner invokes the court's jurisdiction to review by writ of certiorari a judgment made final on May 1989. Judgment was entered by the Supreme Court of the State of Louisiana denying his application for writ of review to the appellate court on its judgment entered on January 30, 1989 with rehearing denied March 15, 1989.

Petitioner seeks writ of certiorari pursuant to 28 USC 1257 to the Court of Appeal of Louisiana, Fourth Circuit grounded in his claim asserted in the court of first instance, the appellate court, and the Supreme Court of Louisiana under the due process and equal protection clauses in the Fourteenth Amendment.

CONSTITUTIONAL PROVISION INVOKEDAMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arose from a judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, making executory in Louisiana a default judgment of the Eighth District Court for the State of Nevada. The Nevada court rendered said judgment as sanction for Noble failing to appear at his scheduled deposition. Noble timely petitioned the Louisiana court, under statutes in Louisiana's Enforcement of Foreign Judgments Act, to vacate its judgment for lack of jurisdiction in the Nevada court. Petitioner represented therein that he was not properly served notice of his deposition, nor was he served sufficient notice of the Nevada hearing on a motion for sanctions; all of which deprived him of his constitutional rights

— in the due process and equal protection clauses of the Fourteenth Amendment.

The Nevada judgment creditors, James McMillan and Marie McMillan, prevailed. Their judgment was maintained. Noble appealed and briefed his position raising the same federal constitutional issues. The appellate court affirmed with written reasons, finding jurisdiction in the Nevada court to render the default judgment. Noble's application for review was denied by the Louisiana Supreme Court. The Louisiana courts' decisions consistently found that jurisdiction existed in the Nevada court over Noble, as one of the three defendants in the original Nevada action. He had been personally served under Nevada's " Long Arm Statute " in 1983 and jurisdiction continued for the rendering of the contested default judgment three

years later; petitioner's jurisdictional argument on the constitutional grounds of insufficient service notwithstanding.

Originally, in 1983, two Nevada residents and your petitioner, Walton B. Noble, were made defendants, allegedly solidarily liable for approximately \$500,000.00 in a civil action for fraud. The plaintiffs' case against the two Nevada residents appears from the record to have been effectively abandoned.

Walton B. Noble, petitioner herein, in August, 1983, filed an answer and counterclaim, after a " Precipae for Default " was entered in July, 1983. No further prosecution of the Nevada plaintiffs' claim against Noble appears in the record until May, 1986, when plaintiffs' commenced with new counsel to conduct discovery, which culminated in the July 8, 1986, judgment by default

in the amount of \$538,000.00, as a sanction imposed against Noble for failing to appear at a May, 1986, deposition. Service by mail in both the notice of deposition and, the motion for sanctions, against Noble for failing to appear was certified to the Nevada court by plaintiffs' counsel.

It is that judgment that was made executory in the Louisiana court of first instance, and Noble is challenging for reasons already stated.

ARGUMENT

Petitioner Walton B. Noble invokes the due process and equal protection clauses of Amendment XIV, Section 1 of the Constitution of the United States and shows deprivation of his rights therein in the following particulars.

Petitioner's case he respectfully submits is extremely important in its precedential aspect in the context of enforcement of foreign judgment laws. The states involved, as do most states subscribe to the uniform act. Petitioner's argument, however, is against such judicial focus on the full faith and credit roots in the law that its own citizens rights to due process and equal protection under law are obscured by a presumption of jurisdiction in the rendering court so strongly that it

becomes irrebutably fixed and preclusive to consideration of, let alone examination of jurisprudence of the sister state with respect to fair and just application of its laws. See Temora Trading Co., Ltd. v. Perry, Nev. 645 P 2d 436 (Sup. Ct. of Nev. 1982). The Nevada court of last resort had recognized willful noncompliance of the court's orders as a prerequisite to the sanction of default judgment under Nevada Rules of Civil Procedure, Rule 37, the same rule applied against Noble without court ordered discovery, and within sixty days of its commencement. Petitioner Noble submits that his right in the equal protection clause of the Fourteenth Amendment was therein violated, and that the Louisiana judgment enforcing the Nevada judgment perpetuated that wrong decision. Moreover, ,

Noble submits that there is an unconstitutional taking of his property in conflict with the Fourteenth Amendment due process clause inherent in that judgment. He asserted lack of jurisdiction in the Nevada court to render such judgment as the central issue in his petition to vacate the Louisiana judgment that made it executory. To support the jurisdictional contention Noble challenged the notice of hearing on the Nevada plaintiffs', James McMillan and Marie McMillan, motion for sanctions under Rule 37 as being defective under Peralta v. Heights Medical CTR. Inc., 485 US-,99 L Ed 2d 75, 108 S Ct. for failing to sufficiently apprise him of an impending dispositive motion such as issued against him. Noble respectfully suggests here that this honorable court should reverse on grounds in the

Fourteenth Amendment protecting his rights in the equal protection and due process clauses.

Noble respectfully submits that the punitive character of the default judgment against him constitutes an unconscionable taking of property under the color of law in deprivation of his Fourteenth Amendment rights to due process and equal protection.

Petitioner's undersigned counsel has been unable to find precedent in Federal, Louisiana, and indeed in Nevada law, under the circumstances of the instant case in which a foreign judgment based solely on a state procedural rule for sanctions (Nevada Rule 37) for failing to attend a deposition was given full faith and credit. In the instant case, without a court order and within sixty days of first notice by counsel,

default judgment issued for \$538,000.00.

Petitioner further respectfully submits that he was not given proper notice under the circumstances, and that he suffered thereby from an aberrant application of a discovery rule which is derived from Federal Rule 37 of the F.R.C.P.

Noble raised the federal constitutional questions in his petition to vacate the Louisiana judgment in the court of first instance, again in the appellate court, and finally in his application to the Louisiana Supreme Court for review. He reiterates his contentions grounded in the Constitution, and again calls attention to an expeditiously rendered final judgment of default in favor of plaintiffs in their claim.

Such a judgment your petitioner

respectfully argues must not be allowed to stand as precedent to spawn a multitude of default judgments as sanction under procedural rules of discovery and perpetuated under enforcement of foreign judgments laws. To do so, Petitioner avers, will result in repeated instances of unwary defendants becoming victims of disparate treatment by courts between citizens within the state, and those without through unconscionable application of procedural rules of discovery bearing upon substantive issues of jurisdiction through proper service. Full faith and credit is underserving in such judgments. Due process and equal protection should prevail.

Respectfully submitted

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1.1

**The Supreme Court of the
State of Louisiana**

JAMES McMILLAN, et al

VS.

NO. 89-C - 0901

WALTON B. NOBLE

IN RE: Noble, Walton B.; - Defendant(s);
Applying for Writ of Certiorari and/or
Review; to the Court of Appeal, Fourth
Circuit, Number 88CA-0859; Parish of Or-
leans Civil District Court Div. "K" Num-
ber 86-14643.

May 19, 1989

Denied.

Supreme Court of Louisiana

May 19, 1989

Deputy Clerk of Court

For the Court

1.2

JAMES MCMILLAN, ET AL NO. 88-CA-0859

VERSUS COURT OF APPEAL

WALTON B. NOBLE FOURTH CIRCUIT

STATE OF

LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT
COURT, THE PARISH OF ORLEANS NO. 86-
14643, DIVISION "K", HONORABLE RICHARD
J. GANUCHEAU

CHARLES R. WARD

JUDGE

(Court composed of Chief Judge Patrick
M. Schott and Judges Charles R. Ward
and Steven R. Plotkin)

John C. Derenbecker

New Orleans, Louisiana

Attorney for Walton B. Noble

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Thomas J. Lutkewitte

J. Paul Demarest

Edward J. Rivera

Favret, Favret, Demarest & Russo

New Orleans, Louisiana

Attorneys for James McMillan and

Marie McMillan

AFFIRMED

James B. and Marie McMillan sued Walton B. Noble for \$538,000 in the Eighth Judicial District Court of Nevada. Noble was personally served in New Orleans with the summons and complaint pursuant to the Nevada Long Arm Statute, N. R. S. 14.065(1), (2). After the legal delay for answer passed, the Nevada Court entered a preliminary default against Noble, but before confirmation of that judgment, Noble, through his attorney, Charles Swanson, answered the McMillan suit and counter-claimed. The defendant, Walton B. Noble, and his attorney Charles Swanson are members in good standing of the Louisiana Bar, but there is nothing in the record to show that either is a member of the Nevada Bar.

On May 2, 1986, the McMillans' Nevada counsel mailed a notice of deposition to Swanson in New Orleans seeking to depose Noble in Las Vegas on May 15, 1986. Swanson notified the McMillans' counsel that Noble would not appear. Five days later pursuant to Nevada Rule of Civil Procedure 37, the McMillans filed a motion for sanctions for failure to comply with discovery, asking to have Noble's answer stricken, and requesting a default judgment against him. The "Notice of Motion" and "Motion For Sanctions For Failure to Comply With Discovery", were mailed to both Swanson and Noble at the address both Swanson and Noble listed as their mailing address in the counter claim. The Motion for Sanctions explicitly informed Swanson and Noble that the requested sanctions were the striking of

Noble's answer and counter-claim, and the rendering of a default judgment against him. Neither Swanson nor Noble appeared to oppose the motion, and a default judgment in the amount of \$538,000.00 was entered against Noble on July 8, 1986.

The McMillans filed a petition in the Civil District Court for the Parish of Orleans to make the Nevada judgment executory in Louisiana in accordance with La. R.S. 13:4241, et. esq., and the Civil District Court entered a judgment against Noble. Shortly thereafter Noble filed his petition to set aside and vacate the order making the judgment executory, which the District Court denied. Noble appeals the judgment of the District Court making the Nevada judgment executory. We affirm.

Noble contested both subject mat-

ter and personal jurisdiction in the Civil District Court however, he has failed to brief the subject matter jurisdiction issue on appeal; therefore, pursuant to Rule 2-12.4 of the Uniform Rules - Courts of Appeal, this issue is considered abandoned.

Noble complains the Nevada judgment is null and void because the Court lacked personal jurisdiction when it rendered the default judgment against him. He argues that insufficient notice of the motion and rule for sanctions vitiated the Court's jurisdiction. Moreover, he contends that as the judgment is a nullity it should be denied "full faith and credit" by Louisiana courts.

Under the U. S. Constitution, Article 4, Section 1, a court in Louisiana must give full faith and credit

within this state to a judgment of a Court in a sister state unless the court in the foreign forum lacked jurisdiction. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), rehearing denied 312 U.S. 712, 61 S.Ct. 548, 85 L.Ed. 1143 (1941); Swain v. Swain, 339 So.2d 453 (La. App. 1st Cir. 1976). This rule is so well established that in a suit for the recognition of a foreign judgment, the only issue in the foreign proceeding which a Louisiana court may review is the question of the foreign court's jurisdiction over the parties. Rice v. Kliebert, 330 So.2d 374 (La. App. 4th Cir. 1976). The relevant law to determine whether the foreign court had jurisdiction is the law of the forum state rendering the original judgment. Fountain v. Fountain, 365 So.2d 1139

(La. App. 3rd Cir. 1978).

The Nevada Supreme Court has held "that when a defendant seeks relief additional to that necessary to protect himself from service of process, he enters a general appearance." Davis v. Eighth Judicial District Court of the State of Nevada, 629 P.2d 1209, 1213 (1981), cert. denied, 454 U.S. 1055 (1981). In that case the Nevada Supreme Court approved the holding of the Supreme Court of California, which is particularly appropriate to this case. "Where the defendant appears, and asks some relief which can only be granted on the hypothesis that the Court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the Court." Godurne v. Superior Court of Los Angeles, 63 Cal. 2d 481, 47 Cal. Rptr. 201, 407 P.2d 1, 3

(1965). Applying the rule of Davis, supra, when Noble counter-claimed for damages allegedly caused by the McMills' breach of contract, he asked for relief which can be granted only by a Court of competent jurisdiction and as a consequence submitted to the jurisdiction of the Nevada court.

Additionally, the Nevada Rules of Civil Procedure are applicable. Rule 12(b) and (h)(1) provide that the defense of lack of personal jurisdiction is waived if not asserted by motion before filing responsive pleadings. Noble did not assert a jurisdictional defense by motion before filing an answer and counter claim. As a consequence, Noble waived any defense of lack of personal jurisdiction by failing to raise the objection in a procedurally proper manner.

Notwithstanding his failure to object to personal jurisdiction prior to filing responsive pleadings, Noble objects to the Nevada Court's jurisdiction because he was not personally served with notice of the motion and rule for sanctions. although N.R.C.P. 5 permits service by mail upon counsel for a party of any pleadings or discovery related requests filed subsequent to the original complaint, Rule 5 also requires personal service on a party of any pleading subsequent to the original complaint which asserts "new or additional claim for relief" and Noble claims the Motion for Sanctions and request for default judgment sought claims for relief in excess of the original complaint. Noble's reliance on the requirement of personal service is misplaced. The motion and rule for

sanctions sought a judgment based on the original complaint. A simple reading of the original complaint compared with the request for default judgment shows it did not assert "new or additional claims for relief", therefore personal service was not required.

Once a Court obtains jurisdiction either through submission by a party or waiver of the defense that Court is not divested of jurisdiction until disposition, and it is questionable whether Noble has raised a jurisdictional issue by this argument. The proper forum to decide procedural questions of notice and applicable sanctions for failure to comply under Nevada law is the Nevada Court.

Because there is the general presumption that a judgment of a sister state is valid, the burden of undermin-

ing such a judgment rests heavily upon the party attacking the judgment to show by clear and positive proof that the rendering court lacked jurisdiction. American Standard Leasing v. Plant Specialties, Inc., 427 So. 2d 555 (La. App. 3rd Cir. 1983). Noble has not carried his burden of proof; his challenge to the Nevada Court's personal jurisdiction is without merit. The Orleans Parish District Court was correct in ruling the Nevada judgment valid, entitling it to full faith and credit.

Noble also contends denial of due process of law because he was not personally served with the notice of the hearing on the Motion for Sanctions. Although Noble relies upon Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896, 97 L.Ed. 2d 817, (1988) to support

his argument, the record reveals that notice of the hearing was mailed to both Noble and Swanson at the address listed on Noble's answer. The notice very clearly informed Noble of the possibility of sanctions, more particularly, the striking of his answer and entry of default judgment. Because Noble submitted to Nevada jurisdiction by filing an answer and considering N.R.C.P. 5 permitting service by mail, Noble was duly notified of the consequences of his failure to appear. Nevada procedural and substantive law unquestionably afforded Noble due process.

Finally, Noble contends that Louisiana's statutes under the Uniform Enforcement of Foreign Judgments Act R.S. 13:4241 et seq are unconstitutional, and as a result his federal

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constitutional due process and equal protection rights will be violated by enforcement of the Nevada judgment. We find no basis for this allegation. Trial Court judgment is affirmed. All costs of this appeal are assessed to Noble.

AFFIRMED

2.1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 86-14643

DIVISION "K" (W)

JAMES AND MARIE MCMILLAN

VERSUS

WALTON B. NOBLE

JUDGMENT

This matter came before the court on the recommendation of the Commissioner and Judge ad Hoc. After considering the law, the evidence and the recommendation of the Commissioner; the objections to the report of the Commissioner are overruled and

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs James and Marie

2.2

McMillan and against defendant Walton B. Noble making the default judgment, entered on July 8, 1986, in the sum of \$538,000.00 in proceeding in the Eighth Judicial District Court of the State of Nevada, executory in Louisiana.

JUDGMENT READ, RENDERED AND SIGNED
in New Orleans, Louisiana this 16th day
of March, 1988

/s/

JUDGE

3.1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 86-14643

DIVISION "K" (W)

JAMES AND MARIE MCMILLAN

VERSUS

WALTON B. NOBLE

REPORT OF THE COMMISSIONER
AND JUDGE AD HOC

In the instant case plaintiffs
filed suit to have a Nevada judgment
recognized as valid in this court.

Defendant Noble answered contend-
ing that the Nevada court lacked juris-
diction. The case was submitted to the
court to determine the narrow law ques-
tion of whether the judgment was valid

or not.

After considering the law and the evidence and for the reasons set forth in plaintiff's memorandum, which the court adopts, the court finds the Nevada judgment to be valid as a matter of law.

August 6, 1987

/s/

COMMISSIONER AND JUDGE AD HOC

